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SUPERIOR COURT
YAVAPAI COUNTY, ARIZONA
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IN THE SUPERIOR COURT

STATE OF ARIZONA, COUNTY OF YAVAPAI

STATE OF ARIZONA, Plaintiff, vs. JAMES ARTHUR RAY, Defendant.	V1300CR201080049 **STATE'S RESPONSE TO DEFENDANT'S MOTION IN LIMINE RE: PRECLUSION OF LAY WITNESS OPINION ON THE ULTIMATE ISSUE** **(The Honorable Warren Darrow)**

The State of Arizona, through undersigned counsel, hereby submits this response to Defendant's Motion in Limine Re: Preclusion of Lay Witness Opinion on Ultimate Issue. The State's position is more fully set forth in the attached Memorandum of Point and Authorities.

MEMORANDUM OF POINTS AND AUTHORITIES

The State agrees that neither lay witnesses nor experts should testify as to their opinion of the Defendant's guilt or innocence or to the credibility of any other witness. The State does not intend to solicit such testimony from any witness. See *State v. Lindsey,* 149 Ariz. 472, 474-475, 720 P.2d 73, 75-76 (1986). However, lay and expert witnesses may, under certain circumstances, offer opinions that embrace ultimate factual issues to be decided by the jury. See *State v. Doerr,* 193 Ariz. 56, 63, 969 P.2d 1168, 1175 (1998); *State v. Williams,* 132 Ariz. 153, 160, 644 P.2d 889, 896 (1982); *State v. Keener,* 110 Ariz. 462, 466, 520 P.2d 510, 514 (1974); Ariz. R. Evid 704. To the extent Defendant

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seeks to preclude this testimony, his motion should be denied.[1] This Response is supported by the attached Memorandum of Points and Authorities.

Legal Argument:

A. Rule 704, Ariz. R. Evid., permits opinion testimony on the ultimate issue.

Rule 704, Ariz. R. Evid., states:

> Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trial of fact.

The State agrees that witnesses may not testify as to their opinion on the guilt or innocence of the Defendant, nor may they testify as to their opinion of the credibility of a witness. This is the type of testimony that was found inadmissible in the cases cited by Defendant.

Defendant cites *Bennett v. State,* 794 P.2d 879 (Wyo. 1990), wherein the prosecutor directly asked a police officer's opinion as to whether the defendant was a drug dealer and solicited the facts from his investigation that formed the basis for his opinion. The officer testified that the defendant was, in his opinion, a drug dealer based on the evidence before the jury. *Id.* at 882-83. The Wyoming Supreme Court found it was "difficult to see how jurors could have believed this was anything but an opinion concerning the defendant's guilt" and reversed the defendant's conviction. *Id.*

In the second case cited by Defendant, *State v. Lindsey,* 149 Ariz. 472, 720 P.2d 73 (1986), the prosecutor specifically questioned the State's expert on her opinion as to what proportion of victims in incest cases lied about what happened. The expert opined that one statistic she had seen indicated it was possibly one percent that lied, but "in general, most people in the field feel that it's a vey small proportion that lie." *Id.* at 77. On redirect examination, the

[1] Defendant's motion as captioned indicates he is only seeking to preclude lay witness opinions; however, in his supporting argument he extends the motion to include expert witness testimony.

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prosecutor compounded the error by questioning the expert as to her opinion on the consistency in the victim's testimony. *Id.* at 78. In reversing the defendant's convictions on the incest charges, the Arizona Supreme Court found the testimony constituted "direct opinion testimony on truthfulness" and was prejudicial. *Id.*

In contrast to the two cases cited above, Arizona case law is replete with examples of testimony that courts have found to be admissible under Rule 704, Ariz. R. Evid., even though it embraced an ultimate issue to be decided by the trial of fact. In *State v. Doerr,* 193 Ariz. 56, 969 P.2d 1168 (1998), the defense elicited testimony from a police officer that he did not believe the defendant was being truthful during questioning on the day of his arrest. On redirect, the prosecutor asked the officer why he believed the defendant was untruthful during the questioning. *Id.* at 63. On appeal, the defendant argued that this testimony intruded on the jury's duty to determine the ultimate issue in the case. The Arizona Supreme Court disagreed and stated:

> Lay witnesses may give opinion testimony, even as to the ultimate issue, when it is "rationally based on the perception of the witness and ... helpful to a clear understanding of the witness' testimony or the determination of a fact in issue." One witness may not, however, state an opinion as to the credibility of another. Here, Officer Gregory's opinion was not intended as a comment on the defendant's credibility as a witness. Indeed, Doerr did not testify at the trial. Moreover, the detective was not speaking as an expert witness on truthfulness. He was merely stating his reasons for not believing the defendant's story.

Id. (internal citations omitted)

In *State v. Williams,* 132 Ariz. 153, 644 P.2d 889 (1982), the defendant was convicted of three counts of dangerous or deadly assault by a prisoner. The weapon used by the defendant in the assaults was a broken broom handle with a jagged, pointed end. None of the defendant's blows injured the SWAT team members he was assaulting. *Id.* at 155. At trial the State called an expert witness to testify as to the type of injuries that could be inflicted by a sharpened stick. *Id.* at 160. The expert gave his opinion that the stick could have caused "serious physical injury." On appeal the

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defendant claimed the trial court erred in allowing the expert to testify on the dangerous nature of the stick. The Arizona Supreme Court disagreed and noted the following:

> Although we may agree that Dr. Froede's testimony was unnecessarily lengthy and technical, we decline to find it irrelevant. ***The question whether the stick was a dangerous instrument was the precise question the jury had to determine to render a verdict under A.R.S. § 13-1206.***
>
> Appellant's final argument that the doctor, not having sat through the trial, should not have given his opinion that the stick was dangerous under the circumstances has no merit. The expert viewed the protective gear and the stick. ***An expert is permitted to give an opinion, Ariz.R.Evid. 703, even if it involves the ultimate issue in the case. Ariz.R.Evid. 704.*** The expert testimony was properly admitted. It was for the trier of fact to weigh the testimony and within its province to reach its own conclusion on the dangerous nature of the instrument.

Id. at 160. (emphasis added)

Other Arizona courts have reached similar conclusions. See *State v. Keener,* 110 Ariz. 462, 465-466, 520 P.2d 510, 513-514 (1974) (Police officer opinion that the quantity and purity of the drugs possessed by the defendant indicated the drugs were for sale rather than personal use was not merely a statement of belief in the guilt of the defendant and was properly admitted); *State v. White,* 26 Ariz. App. 505, 509, 549 P.2d 600, 604 (App. 1976) (No error in permitting a police officer to give his opinions as to whether the marijuana found in the defendant's luggage was possessed for sale); *State v. Gentry,* 123 Ariz. 135, 137, 598 P.2d 113, 115 (1979) (It was proper for law enforcement officer to testify as an expert in vehicular manslaughter case "even though one of his conclusions was that the defendant was driving, an ultimate issue for the jury's determination."); *Bliss v. Treece,* 134 Ariz. 516, 518, 658 P.2d 169, 171 (1983) (No error to allow police officer to testify that in his opinion the plaintiff was following the defendant too closely. Although the question is an issue for the jury, "[e]xpert opinion will not be rejected merely because it touches an ultimate issue or possibly invades the 'province of the jury.")

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In *Dunham v. Pima County,* 161 Ariz. 304, 778 P.2d 1200 (1989), the Arizona Supreme Court found the trial court erred in not allowing testimony from an expert that embraced the ultimate issue for the jury. In *Dunham,* a motorist injured in an automobile accident brought action against Pima County claiming the county had not provided sufficient traffic control at the intersection where the accident occurred. At trial, the trial court precluded the plaintiff's expert from testifying as to his opinion on the dangerousness of the intersection finding that the question was one for the jury. On appeal, the Supreme Court found the trial court's erred and stated:

> This ruling was an abuse of discretion at least for the reason given. It is too late in the day to keep from the jury otherwise helpful opinion testimony from a qualified expert simply because the opinion embraces issues the jury will be asked to decide. *See* Ariz.R.Evid. 704; *Bliss v. Treece,* 134 Ariz. 516, 518, 658 P.2d 169, 171 (1983); M. Udall & J. Livermore, *Law of Evidence* § 26 (2d. ed. 1982); *McCormick on Evidence* § 12 (3d ed. 1984). Since the promulgation of Rule 704, which was intended to reduce, if not eliminate, this basis for objection, this and other courts have upheld trial court rulings allowing expert opinions in analogous contexts. *See, e.g., State v. Williams,* 132 Ariz. 153, 160, 644 P.2d 889, 896 (1982) (expert opinion that stick used in an assault was of a "dangerous nature"); *Karns v. Emerson Electric Co.,* 817 F.2d 1452, 1459 (10th Cir.1987) (testimony concerning the "unreasonably dangerous" nature of an implement in a products liability action).

Id. 161 Ariz. at 307, 778 P.2d at 1203.

Conclusion

The State agrees that witnesses may not testify as to their opinion of Defendant's guilt or innocence or to their opinion of the credibility of any trial witness. However, Rule 704, Arizona Rules of Evidence, clearly permits testimony in the form of an opinion or inference, even when it embraces an ultimate issue to be decided by the trier of fact, provided it is otherwise admissible. To the extent Defendant's motion seeks to preclude this evidence it should be denied.

RESPECTFULLY submitted this 6th day of January, 2011.

By Sheila S Polk
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